

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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**OAKWOOD HEALTHCARE,**

**Employer**

**- and -**

**CASE 7-RC-22141**

**INTERNATIONAL UNION, UNITED AUTOMOBILE,  
AEROSPACE AND AGRICULTURAL IMPLEMENT  
WORKERS OF AMERICA (UAW), AFL-CIO,  
Petitioner.**

**BEVERLY ENTERPRISES-MINNESOTA, INC.,  
d/b/a GOLDEN CREST HEALTHCARE CENTER,**

**Employer**

**- and -**

**CASES 18-RC-16415 and  
18-RC-16416**

**UNITED STEELWORKERS OF AMERICA,  
AFL-CIO, CLC,**

**Petitioner.**

**CROFT METALS, INC.,**

**Employer**

**- and -**

**CASE 15-RC-8393**

**INTERNATIONAL BROTHERHOOD OF BOILER-  
MAKERS, IRON SHIP BUILDERS, BLACKSMITHS,  
FORGERS AND HELPERS, AFL-CIO  
Petitioner.**

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**AMICUS CURIAE BRIEF  
*on behalf of***

**METROPOLITAN JEWISH HEALTH SYSTEMS  
AMERICAN HEALTH CARE ASSOCIATION  
NEW YORK STATE ASSOCIATION OF HEALTH CARE PROVIDERS  
NEW YORK STATE HEALTH FACILITIES ASSOCIATION**

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**September 19, 2003**

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## I. Introduction

This *Amicus Curiae* brief is filed on behalf of Metropolitan Jewish Health System, Inc., the American Healthcare Association, the New York State Association of Health Care Providers, Inc., and the New York State Health Facilities Association, Inc. The sponsors of this brief express their appreciation to the members of the National Labor Relations Board (“NLRB” or “the Board”) for the opportunity to be heard on this important issue. The sponsors also commend the Board for requesting guidance on the appropriate interpretation of Section 2(11), the definition of “supervisor,” under the National Labor Relations Act (“the Act”).

The NLRB has wrestled with Section 2(11) for many years. The American workplace has changed dramatically since the provision’s enactment in 1947. Uniform application of the section to the diverse modern workplace has been difficult. Passage of the 1974 Health Care Amendments introduced the Act to the unique needs of the health care industry. Today, the Board’s interpretation is an amalgam of principles from thousands of factually disparate cases.

That the NLRB’s case-by-case process has resulted in a long series of glosses on the law is not surprising. Our law evolves by repeated evaluation and application through the decades. However, inherent in this process is the risk that the statute may be “interpreted” away from the actual intent of Congress. The Supreme Court found this is exactly what has happened to Section 2(11), in NLRB v. Health Care & Retirement Corp., 511 U.S. 571 (1994) (“HCR”), and in NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001) (“Kentucky River”). It is appropriate for the Board to take a new look at its interpretation of this section.

This brief is divided into three sections. First, an introduction on the legislative history and Congressional intent behind Section 2(11); the second, a discussion of the ten questions posed by the Board in its Notice and Invitation to File Briefs; and lastly, suggestions

for application of Section 2(11) in the three cases pending before the Board.

A. Statutes Are to Be Interpreted According to their Plain Meaning and the Intent of Congress

It is a fundamental premise of American jurisprudence that statutes are to be interpreted according to their plain meaning. U.S. v. Ripa, 323 F.3d 73, 81 (2d Cir. 2003), *citing* Natural Resources Defense Council, Inc. v. Muszynski, 268 F.3d 91, 98 (2d Cir. 2001). Where a statute is not sufficiently clear to determine its actual meaning, courts are guided by long-recognized rules of statutory construction. Ambiguities are resolved by applying the intent of Congress in enacting the law. Kruman v. Christie's Int'l PLC, 284 F.3d 384, 400 (2d Cir. 2002); DeOsorio v. United States I.N.S., 10 F.3d 1034, 1043 (4th Cir. 1993). Once the Congressional intent is determined, statutes are then given a reasonable and sensible construction to effectuate that intent. In re Pacific Atlantic Trading Co., 64 F.3d 1292, 1303 (9th Cir. 1995); Salomon Forex, Inc. v. Tauber, 8 F.3d 966, 975 (4th Cir. 1993).

The ambiguities of Section 2(11) clearly call for analysis of the legislative intent. Interpretation of each ambiguous phrase begins with the intent of Congress. That intent can only be understood by reviewing the legislative history of the Act.

B. The Legislative Intent of Section 2(11)

1. Pre-1947: Supervisors Were Neither Defined nor Excluded

The Act, as originally enacted, did not define nor exclude supervisors. The Supreme Court stated that at first the Act “defined ‘employee’ expansively (if circularly) to ‘include any employee.’ We therefore held that supervisors were protected by the Act.” Kentucky River, 532 U.S. at 718, *citing* Packard Motor Car Co. v. NLRB, 330 U. S. 485 (1947). At the time of the Act’s passage, the practical needs of employers to effectively manage their enterprises were not foremost in Congress’ thoughts. As a result, supervisors were commonly

represented by the same union (often within the same unit) as the employees they supervised. A clear conflict of interest and practical problems for management were presented. As experience under the Act grew, the Board and Congress recognized that the interests of the employer community warranted protection.

In response, the Board developed a policy of avoiding placement of supervisors in the same units as the employees they supervise. Douglas Aircraft Co., 50 NLRB 784, 787 (1943), *cited at Kentucky River*, 532 U.S. at 718. Congress acknowledged the problem and began to legislatively address it in 1945, beginning with proposed legislation which came to be known as the "Case bill." The bill would have removed supervisors from coverage of the Act. During debate on the bill, Representative Jennings articulated the Act's supervisory problem:

... A foreman, a supervisory employee should keep faith with his employer, and not to be on both sides of the fence. ...There should be no twilight zone in this thing. A man cannot serve two masters; either he will cling to the one or despise the other. Let us provide that he shall be true to his trust, work for the people who hire him to do a specific job and if he goes to the other side then strike from him the bargaining rights and the protection afforded the general employees...

(92 Cong. Rec. 846 February 4, 1946). Similarly, Senator Ball framed the issue this way:

The NLRB now says everybody is an "employee." Unless the line is drawn by law at the point between actual production workers and the lowest rank of actual management, where is the line to be drawn? Is the level of those subject to organization to be raised by successive steps until all employees of a company, including the president and other officers, are in the production union, and thus subject to union "discipline"? Actually there are two parties to a labor contract, the owners of the business and the workers. Those parties designate agents to represent them. In the case of the owners the agent is what we call management. In the case of the workers it is generally a labor organization. The NLRB has found regularly that there can no true collective bargaining if management interferes with the designation of the bargaining agent of the workers. It is equally true that there can be no effective collective bargaining if the agent of the workers interferes with the personnel

which, as a part of management, carries out the orders of management and exercises control over production, discipline, and the administration of the labor contract. The capture of any element of management, and the compromising or impairment of the undivided loyalty of any element of management, by a labor organization is an interference with the function of management just as surely as the giving by management of improper inducements to the agents of the workers is an interference with their rights.

Senate Report 1177, April 15, 1946; Senator Ball, Committee on Education and Labor (Part 2, pp. 17-19). In 1946, after lengthy debates and amendments, the Case bill passed both houses of Congress, but was vetoed by President Truman. Congress again took up the issue again the following year, as part of the Taft-Hartley amendments.

## 2. Taft-Hartley: Congress Re-States the Law

The Taft-Hartley amendments specifically sought to harmonize the benefits gained by employees under the Act with “carefully drawn legislation” to eliminate “specific types of injustice [and] clear inequities between employers and employees.” S.Rep.No.105, 80th Cong., 1st Sess. 1, *reprinted in* Leg. History of the LMRA, 1947, 407 (1974). One of those specific injustices was the failure of the Act to exclude “supervisors” from the definition of “employees” within the law:

### SUPERVISORY PERSONNEL

A recent development which probably more than any other single factor has upset any real balance of power in the collective-bargaining process has been the [invocation of] the Wagner Act for covering supervisory personnel, traditionally regarded as part of management.

S.Rep.No.105, 80th Cong., 1st Sess. 3, *reprinted in* Leg. History of the LMRA, 1947, 409 (1974). Likewise, Representative Hartley’s House report identified “the loyalty of supervisors.. . undermined by the compulsory unionism imposed upon them by the National Labor Relations Board” as an evil sought to be corrected by the amendment. H.Rep.No.245, 80th Cong., 1st

Sess. 5, *reprinted in Leg. History of the LMRA, 1947, 296 (1974)*. “The evidence before the committee showed this to be one of the most important and most critical problems.” H.Rep. No.245, 80th Cong., 1st Sess. 13, *reprinted in Leg. History of the LMRA, 1947, 304 (1974)*.

. . . [U]nionizing supervisors under the Labor Act is inconsistent with the purpose of the act to increase output of goods that move in the stream of commerce, and thus to increase the flow. It is inconsistent with the policy of Congress to assure workers freedom from domination or control by their supervisors in their organizing and bargaining activities. It is inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants . . .

H.Rep.No.245, 80th Cong., 1st Sess. 14, *reprinted in Leg. History of the LMRA, 1947, 305 (1974)*.

The Senate Report considered the Board’s inclusion of supervisors to be “folly.” S.Rep.No.105, 80th Cong., 1st Sess. 4, *reprinted in Leg. History of the LMRA, 1947, 410 (1974)*. Senator Taft’s Report included a recitation of the danger to industry if employers were bound to recognize and collectively bargain with units comprised of supervisors. It concluded: “It is natural to expect that unless Congress takes action, management will be deprived of the undivided loyalty of its foremen.” S.Rep.No. 105, 80th Cong., 1st Sess. 5, *reprinted in Leg. History of the LMRA, 1947, 411 (1974)*.

Similarly the House report stated:

#### RIGHTS OF EMPLOYERS

The evidence further shows that management must have ... agents who are entirely loyal, just as representatives of the workers must be undivided in their loyalty to the workers.

H.Rep.No.245, 80th Cong., 1st Sess. 8, *reprinted in Leg. History of the LMRA, 1947, 299 (1974)*. The House report concluded:

If management is to be free to manage American industry as in the past and to produce the goods on which depends our strength in

war and our standard of living always, the Congress must exclude foremen from the operation of the Labor Act...

H.Rep.No.245, 80th Cong., 1st Sess. 15, *reprinted in* Leg. History of the LMRA, 1947, 306 (1974). In language presaging contemporary court decisions, the House report said the NLRB tended to interpret the Act to maximize coverage of the statute. The report noted that Congress intended that the Act should always have been construed to exclude “supervisors,” but that “the Labor Board, in the exercise of what it modestly calls its ‘expertness,’ changed the law: That no one, whether employer or employee, need have as his agent one is obligated to the those on the other side, or one whom, for any reason, he does not trust.” H.Rep.No.245, 80th Cong., 1st Sess. 17, *reprinted in* Leg. History of the LMRA, 1947, 308 (1974).

Finally, the Senate Report explained its recommended amendment, today’s §2(11): “All that the proposal does is to prevent employers being compelled to accord supervisors the anomalous status of employees for the purpose of the Wagner Act.” S.Rep.No.105, 80th Cong., 1st Sess. 19, *reprinted in* Leg. History of the LMRA, 1947, 425 (1974).

The Taft-Hartley bill passed both houses, and overrode President Truman’s veto.

In direct response to needs of the American workplace, Congress expressly excluded “supervisors” from the definition of “employees” and thereby from the protections of the Act. Kentucky River, 532 U.S. at 718.

3. Congressional Intent Protects Employee Rights and the Employers’ Right to Rely on the Loyalty of Its Supervision

The Board has traditionally assumed that organizational rights of employees are the only interest protected by the Act, and has viewed contentions of supervisory status with disfavor and suspicion. The Board has frequently held that it must construe §2(11) narrowly, to avoid denying employees the rights provided by the Act. Wal-Mart Stores, Inc., 335 NLRB

1310, 1314 (2001); St. Alphonsus Hospital, 261 NLRB 620, 624 (1982), *citing Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970). Unquestionably, the Board must interpret the law to give effect to the intent of Congress, and the broadest scope of Congressional intent under the Act surely is to protect the rights of employees. However, the intent of Congress did not stop with employee rights under Section 7.

With the 1947 Taft-Hartley amendments, Congress explicitly asserted that as a matter of public policy, management must be free to rely on the undivided loyalty of its supervisors. In no industry is this policy more vital to the public interest than in the health care. Health care employers entrust their supervisors with more than the success of their businesses; they entrust them with the lives of our citizens. Congress' concerns regarding the negative impact of attenuated supervisor loyalty (reduced productivity, diminished quality, etc.) could have no more compelling significance than where the "product" provided to the public is health care. It is abundantly clear from the circumstances of Section 2(11)'s passage that the interests protected by the National Labor Relations Act are more than exclusively those of employees.

C. In the Health Care Industry, Board Law Has Avoided Implementing the Congressional Intent to Exclude Supervisors from Coverage of the Act

The Board has been highly reluctant to find supervisory status among nurses in the health care industry. The Board has often been criticized for inconsistency in the application of § 2(11), and for repeatedly creating super-statutory obstacles to the supervisory status of nurses. For instance, the Fourth Circuit stated

So manifest has this inconsistency been, that a commentator ... aptly observed that "the Board has so inconsistently applied the statutory definition" of supervisor as to cause one to speculate "that the pattern of Board decisions ... displays an institutional or policy bias" ... as illustrated by a practice of adopting that "definition of supervisor that most widens the coverage of the Act, the definition that maximizes both the number of unfair labor

practices findings it makes and the number of unions it certifies.”

NLRB v. St. Mary's Home, Inc., 690 F.2d 1062, 1067 (4th Cir. 1982), *citing* Note, *The NLRB and Supervisory Status: An Explanation Of Inconsistent Results*, 94 Harv. L. Rev. 1713, 1713-14 and 1721 (1981). *See also* Spentonbush/Red Star Co. v. NLRB, 106 F.3d 484, 491 (2nd Cir. 1997); NLRB v. Winnebago Television Corp., 75 F.3d 1208, 1214 (7th Cir. 1996); Schnuck Markets v. NLRB, 961 F.2d 700, 703-704 (8th Cir. 1992).

In the 1980s, the Board created a *de facto* exception from Section 2(11) for any supervisory authority directed toward patient care, and applied it in numerous cases. Northcrest Nursing Home, 313 NLRB 491, 491-92 (1993) (finding a special interpretation of “in the interest of the employer” in health care cases); The Ohio Masonic Home, Inc., 295 NLRB 390, 395 (1989) (no supervisory status because the direction of work was in regard to the treatment of patients); Beverly Manor Convalescent Centers, 275 NLRB 943 (1985) (supervisory duties in the furtherance of patient care are not within “the interest of the employer”).

In 1994, the Supreme Court rejected the patient care exception. In HCR, 511 U.S. 571 (1994), the Court reviewed a Board finding that although certain nurses responsibly directed employees (and thus would have met the statutory standard), their actions were motivated by a concern for the well being of the patients, which was not “the interest of the employer.” *Id.* at 575. The Court chided the Board for developing a separate non-statutory standard for one industry. *Id.* at 582-83. Finally, the Court made the common-sense determination that since patient care was the business of the health care employer, patient care was in the interest of the employer. *Id.* at 577-78.

Following HCR, the Board replaced the patient care exception with a new blanket rationale in supervisory nurse cases: an alleged lack of independent judgment. Rest Haven

Nursing Home, 322 NLRB 210 (1996) (direction of employees to ensure care showed no independent judgment); Parkview Manor, 321 NLRB 477, 478 (1996) (assignment of work to employees based on nurses' assessment of employees skills showed no independent judgment); Washington Nursing Home, Inc., 321 NLRB 366 (1996) (the work directed was "repetitive, and required little skill," thus its assignment and direction did not involve independent judgment).

The Board's independent judgment analysis evolved, however continuing to hold, in case after case that nurses do not use "independent judgment" when they exercise "ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards." Loyalhanna Care Center, 332 NLRB 933 (2000); Illinois Veterans Home of Anna L.P., 323 NLRB 890, 891 (1997); Providence Hospital 320 NLRB 717, 729 (1996). The Board held that a nurse's direction of subordinates was the product of *professional*, not *independent* judgment. This issue was squarely addressed by the Supreme Court in Kentucky River, 532 U.S. 706 (2001).

The Court found that that the Board had replaced its patient care exclusion with a different categorical exclusion for nurses; specifically, that nurses do not exhibit "independent judgment" where they use "ordinary professional or technical judgment in directing less-skilled employees to deliver services." Kentucky River, 532 U.S. at 713. Because "the Board's categorical exclusion turns on factors that have nothing to do with the *degree* of discretion," the Court rejected it as another attempt by the Board to "rea[d] the responsible direction portion of §2(11) out of the statute in nurse cases." *Id.* at 716, citing HCR, 511 U.S. at 579-580.<sup>1</sup> Thus, the

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<sup>1</sup> In the few supervisor nurse cases since Kentucky River, the Board has perfunctorily cited Kentucky River without embracing the Court's change in law as part of its own legal analysis. Nurses For Improved Healthcare, 338 NLRB No. 113 (March 20, 2003); Beverly Manor of Monroeville, 335 NLRB No. 54 (Aug. 27, 2001); Lutheran Home of Moorestown, 334 NLRB 340 (2001).

Court found again that the Board had pursued the same objective: tailoring the Act's interpretation to categorically remove nurses from the coverage of Section 2(11).

D. The Board's Interpretation of Section 2(11) Should Be Faithful to the Wording of the Act and to the Expressed Intent of Congress

Throughout this Brief, the *amici* urge the Board to avoid creating special tests for any industry, including health care. In applying Section 2(11) to the facts of each case, the Board should remain true to the plain wording of the statute. Where that wording is ambiguous, the Board must honor the stated intent and goals of Congress in passing and amending the Act.

Several fundamentals of Board law have not changed. The Board continues to decide matters review the facts of each matter on a case-by-case basis. St. Alphonsus Hospital, 261 NLRB at 624. The fact-sensitive language of Section 2(11) demands no less. The Board must heed the clear directive of the statute that it is the *possession* of the statutory authority which defines a "supervisor." Atlanta Newspapers, 263 NLRB 632 (1982). The frequency with which a supervisor exercises such authority is not dispositive. Exeter Hospital, 248 NLRB 377, 378 (1980). As the Board has consistently held, the Act only requires the possession of a *single* facet of supervisory authority to satisfy the statutory standard. Albany Medical Center, 273 NLRB 485, 486 (1984).

Further, the Board should remember that its examination of the facts must not be academic, but take into consideration the realities of the individual workplaces. Empress Casino Joliet Corp. v. NLRB, 204 F.3d 719, 720 (7th Cir. 2000); American Commercial Barge Line Company, 337 NLRB No. 168 (slip op. at 8-9) (Aug. 1, 2002). Application of §2(11) cannot be hyper-technical, but rather should reflect the reality of the workplace at issue. In this regard, so-called secondary indicia (although not dispositive) cannot be ignored. They are guideposts which are vitally important in close cases because they indicate the realities of the workplace -

realities which should inform the Board's interpretation of disputed facts.

Interpretation of §2(11) relies upon the intent of Congress. That intent is clear. As the House Report stated, the exclusion of supervisors is a *right of employers* under the law. *Supra*, H.Rep.No.245, 80th Cong., 1st Sess. 8. This right is not paramount to protected employee rights, but warrants equal recognition. It should not be disfavored, nor should the Board attempt to limit the extent to which the statute recognizes supervisory status. If this results in a few more individuals being deemed "supervisors," such is the will of Congress.

## II. Questions Posed by the Board

### A. Question One: "Independent Judgment" and "Discretion" under the Act

The Board's first question concerns the definition of "independent judgment" and several interrelated phrases."<sup>2</sup> The starting point is, of course, the Act itself. Section 2(11) reads

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Understanding "independent judgment" begins with the plain meaning of the statutory words. They provide clear guidelines without the need to resort to supplemental legal theories.

#### 1. "Independent Judgment," "Routine," and "Clerical" Have their Ordinary Meanings

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<sup>2</sup> The Board's question reads in full: "What is the meaning of the term 'independent judgment' as used in Section 2(11) of the Act? In particular, what is 'the degree of discretion required for supervisory status,' i.e., 'what scope of discretion qualifies' (emphasis in original)? Kentucky River at 713. What definition, test, or factors should the Board consider in applying the term 'independent judgment'?"

Applying the plain language of the statute, “independent” means “not dependent; free; not subject to control by others; not relying on others.” Webster's Revised Unabridged Dictionary, 1996, 1998. “Judgment” means “the operation of the mind, involving comparison and discrimination, by which a knowledge of the values and relations of things, whether of moral qualities, intellectual concepts, logical propositions, or material facts...” *Id.* Thus, “independent judgment” is the cognitive process of an individual unilaterally reaching a decision by evaluating the facts and intellectual concepts.

However, the term “independent judgment” does not exist in a vacuum. § 2(11) is series of interdependent concepts. To be supervisory, the judgment must relate to the exercise of authority as defined by the Act. It must also be judgment which is more than “of a merely routine or clerical nature.” “Routine” is “any regular course of action or procedure rigidly adhered to...” Webster's Revised Unabridged Dictionary, 1996, 1998. “Clerical” is defined as “of or relating to a clerk or copyist, or to writing.” *Id.* Thus, the requisite judgment must be of some moment, more than just ministerial, and not merely the rote following of procedure.

## 2. “Discretion” Is the Essence of Independent Judgment

The Kentucky River Court noted, “the statutory term ‘independent judgment’ is ambiguous with respect to the degree of discretion required for supervisory status.” 532 U.S. at 713, *citing HCR, supra*, at 579. Further, the Court acknowledged that “many nominally supervisory functions may be performed without the ‘exercise of such a degree of... judgment or discretion ... as would warrant a finding’ of supervisory status under the Act.” 532 U.S. at 713, *citing Weyerhaeuser Timber Co.*, 85 NLRB 1170, 1173 (1949). The Court recognized that it is within the Board’s discretion to determine, within reason, the scope and degree of discretion

which will qualify as supervisory “independent judgment.” 532 U.S. at 713. The Court thus identified *discretion* as the key element of independent judgment.

Kentucky River also recognized that the degree of judgment ordinarily be required may be reduced below the statutory threshold by the employer’s detailed orders and regulations. 532 U.S. at 713-14, *citing* Chevron Shipping Co., 317 NLRB 379, 381 (1995). Merely following procedure removes discretion, and renders a decision “routine.” However, the Court cautioned the Board against blanket categorical exclusions from “independent judgment.”<sup>3</sup> 532 U.S. at 714. The sole analysis, said the Court is “the question of degree of judgment.” *Id.*

Indeed, the Court’s analysis speaks directly to the definition of “*independent judgment*.”<sup>4</sup> This is the *discretion* of the supervisor to make judgments. What is the quantum of discretion an individual must have to satisfy the Act? The plain wording of the Act again guides us. A supervisor has the discretion to make judgments which are more than *routine*. In other words, judgments which are beyond the “rigidly adhered to” patterns, practices, or policies of the employer. *See Webster’s, supra.*

### 3. The Test for Independent Judgment: Measure the Degree of Discretion by Analyzing the Nature and the Impact of the Judgment Exercised

Where is the dividing line between non-supervisory and supervisory independent judgment? Neither the Act, nor the legislative history provide a test. Congress did not debate the meaning of “independent judgment.” However, we have several markers which outline the

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<sup>3</sup> In Kentucky River, the Court stated the Board could not exclude “ordinary professional or technical judgment in directing less-skilled employees to deliver services.” 532 U.S. 706, 714-15. Such an exclusion is inconsistent with the statutory language, because “professional” and “technical” are factors which “have nothing to do with the degree of discretion.” *Id.*

<sup>4</sup> “Independent” means not controlled by others. However, strictly adherence to an absence of control definition would mean *no one* would ever satisfy the standard. Every supervisor and manager is *controlled* by the requirements and policies of the employer. Rather, “independent” here describes the autonomy of a supervisor to render judgment, albeit within parameters.

proper analysis. Clearly, Congress gave the words “independent judgment” their common meaning. However, Congress also modified the common definition by informing us that statutory independent judgment is *not* routine or clerical in nature. Thus, if the extent of discretion available to the putative supervisor is too slight, his or her judgments will be routine and not supervisory. The *character* (professional, technical, patient care, etc.) of the judgment is not germane: if the judgment is not routine, and it impacts any of the twelve areas of Section 2(11), it is supervisory.

These predicates leave two avenues of analysis: what is the *nature* of the judgment and what is the *impact* of its exercise? Satisfaction of the statute demands an adequate showing in both areas.

To satisfy the *nature* test, the discretion must be unilaterally exercised, and reflect a degree of cognitive effort which is greater than merely following pre-established management directives. It is “unilateral” in that it is self-directed discretion, as opposed to requesting managerial guidance or approval. “Pre-established managerial guidelines” are rules, policies, or practices which remove the exercise of discretion by the putative supervisor. For instance, if the employer’s rule is that no more than two production employees may take their lunch hours at once, then informing the third that he cannot go demonstrates no discretion. However, if the putative supervisor makes the decisions as to how many should go to lunch, who they are, and when they go, some discretion is shown. Further, if that decision is made based on an assessed projection of afternoon workflow and attaining the maximum benefit for the department, an even greater degree of discretion is shown.

The statutory predicate will be satisfied by a showing of more than *de minimis* discretion. However, the putative supervisor must also satisfy the impact test.

The *impact* test examines two factors. The first is whether the judgment impacts any of the twelve statutory criteria. For instance, if the judgment results in the imposition of discipline, the assignment of work, or otherwise affects (or effectively recommends an effect upon) subordinates' terms and conditions of work, it will satisfy the requirement. The second factor is the significance of the decision made through the supervisor's exercise of discretion. Put another way, it is the impact that decision has in the workplace. By way of example, if a production supervisor exercises her discretion by deciding to assign employees to perform particular projects, then she has met the first part of the impact test: the assignment of work is a statutory criteria. If the project she has assigned is to file production records in cabinets, it may be of relatively low impact. If she assigns them to a project which could result in improved (or diminished) department production performance, the impact of the decision is potentially greater.

The impact may also be measured by the depth of its effect upon the employee's terms and conditions of employment. If the putative supervisor can effect employees by assigning work which is desirable, or more lucrative, or less so, or more difficult or demanding, then a greater impact is demonstrated.

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The Board, as an element of its healthcare industry "patient care" and "professional judgment" theories, held that the significance of the decisions are irrelevant. In Ten Broeck Commons, 320 NLRB 806 (1996) (discussed *infra*), the Board held that although nurses' assignment and direction of employees had a direct impact on human life, and that severe adverse consequences to the employer and its business might flow from nurses' decisions, such decisions were still "routine," and as such, no independent judgment was shown. *Id.* at 811. Ten Broeck Commons was overruled by the Supreme Court in Kentucky River. In stark contrast the Board has noted that direction of employees working on equipment "valued in excess of \$12

million” demonstrated adequate “independent judgment.” The Atlanta Newspapers, 306 NLRB 751 (1992); *see also* American Commercial Barge Line Co., 337 NLRB No. 168 (slip op. at 2) (Aug. 1, 2002) (safety responsibilities of barge pilots was indicia of supervisory status); Sun Refining & Marketing Co., 301 NLRB 642, 649 (1991) (value of cargo a factor in determining status).

Where a supervisor’s independent decisions carry significant consequences for the employer’s business (the welfare of a patient, compliance with regulations, etc.), the gravity of the decisions must be factored into the analysis of whether “independent judgment” is present. Put another way, the Board has long recognized that a would-be supervisor’s authority to make purchases for, or otherwise bind the employer to outside obligations is persuasive evidence that the employee possesses supervisory authority. Essbar Equipment Co., 315 NLRB 461 (1994); *see also* NLRB v. Prime Energy Ltd., 224 F.3d 206, 212 (3d Cir. 2000) . It can hardly be argued that the unilateral direction of employees to execute tasks which carry profound legal or financial implications for the employer are any less supervisory.

Satisfaction of the impact test does not relieve the putative supervisor of showing that the nature of the decision is truly more than “routine,” and that it must implicate one of the statutory criteria. The significance of the decision is a factor which runs directly to the depth of discretion - which is at the heart of the “independent judgment” inquiry.

The impact test satisfies the statutory standard by a showing (a) that the judgment impacts one of the twelve criteria, and (b) the gravity of the decision made is more than of *de minimis* significance. In the example above, if the sole supervisory indicum is the assignment of employees to filing papers in cabinets, the impact of that decision is low. We can deduce from that decision that the amount of discretion the putative supervisor possesses is negligible.

The nature and impact tests determine if the employee has any independent discretion, if that discretion is relevant to a statutory authority, and the depth of that discretion. If the putative supervisor fails to establish either unilateral discretion *or* an impact on the statutory criteria, the review ends; the individual is not a supervisor. If the individual establishes at least threshold discretion and impact, there still remains the question of *degree*. The Supreme Court has recognized that the *degree* of independent judgment can affect the supervisory determination. For instance, using the example above, if the only supervisory indicia in a particular case is that the asserted supervisor may unilaterally direct employees when to take meal breaks - both the *nature* and the *impact* may exist, but be so minimal that supervisory status should not be found.<sup>5</sup>

B. The Definitions of “Professional Employees” and “Supervisors” Under the Act Are Not Inconsistent

For several years, the Board characterized its decisions denying supervisory status to nurses under the theory that “professional employees” must be distinguished from other employees for fear that all professionals would be eliminated from coverage of the Act, because it is presumed that all professionals exercise a high degree of “independent judgment.” Hillhaven Rehabilitation Center, 325 NLRB 202, 203 (1997). In Kentucky River, the Supreme Court corrected the Board. Now, the Board seeks guidance on the question.<sup>6</sup>

1. It Is Clear from the Act and Supreme Court Decisions that “Professional Judgment” Cannot Be Excluded from “Independent Judgment”

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<sup>5</sup> Examples of the tests application is included in Section III, *infra*.

<sup>6</sup> Question number 5 in the Board’s Notice and Invitation to File Briefs reads: Is there tension between the Act’s coverage of professional employees and its exclusion of supervisors, and, if so, how should that tension be resolved? What is the distinction between a supervisor’s “independent judgment” under Sec. 2(11) of the Act and a professional employee’s “discretion and judgment” under Sec. 2(12) of the Act? Does the Act contemplate a situation in which an entire group of professional workers may be deemed supervisors, based on their role with respect to less-skilled workers?

The Act does not permit the Board to modify or ignore its terms. The Supreme Court's guidance to the Board is illustrative here. The Court said:

...the Board contends that its interpretation is necessary to preserve the inclusion of "professional employees" within the coverage of the Act. Professional employees by definition engage in work "involving the consistent exercise of discretion and judgment." §152(12)(a)(ii). Therefore, the Board argues (enlisting dictum from our decision in NLRB v. Yeshiva Univ., 444 U. S., at 690, and n. 30, that was rejected in [HCR] see 511 U. S., at 581-582), if judgment of that sort makes one a supervisor under §152(11), then Congress's intent to include professionals in the Act will be frustrated, because "many professional employees (such as lawyers, doctors, and nurses) customarily give judgment-based direction to the less-skilled employees with whom they work." The problem with the argument is not the soundness of its labor policy... It is that the policy cannot be given effect through this statutory text. See [HCR], *supra*, at 581 ("[T]here may be 'some tension between the Act's exclusion of [supervisory and] managerial employees and its inclusion of professionals,' but we find no authority for 'suggesting that that tension can be resolved' by distorting the statutory language in the manner proposed by the Board") (*quoting NLRB v. Yeshiva Univ.*, *supra*, at 686)...

...at issue is the Board's contention that the policy of covering professional employees under the Act justifies the categorical exclusion of professional judgments from a term, "independent judgment," that naturally includes them.... these contentions contradict both the text and structure of the statute, and they contradict as well the rule of [HCR] that the test for supervisory status applies no differently to professionals than to other employees. 511 U. S., at 581.

Kentucky River, 532 U.S. at 720. Thus, the Supreme Court said it plainly: (1) the Act cannot be interpreted to categorically exclude "professional" from "independent" judgment; (2) the Act cannot be interpreted to exclude the professional judgment-driven direction of employees from the Section 2(11) standard; and (3) the statutory test must be the same in all industries.

Further, Section 2(12) defines a "professional" (*in pari materia*) as

- (a) any employee engaged in work

- (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work;
- (ii) involving the consistent exercise of discretion and judgment in its performance;
- (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time;
- (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes;

29 U.S.C. § 152(12). The definition mentions “routine,” “discretion,” and “judgment,” but in a different context. There is no reference to “independent judgment,” nor any reference to the statutory authorities of § 2(11). Indeed, the sole reason the Act defines “professional employees” is because Section 9(b) presents special rules for the inclusion of professional and non-professional employees in one unit. In short, the Court directs the Board to follow the statutory language, regardless of any policy implications.

C. The Board Has Historically Recognized that “Assign” and “Responsibly to Direct” Have their Plain Meanings

The Board poses three questions concerning the definitions of the words “assign” and “responsibly to direct.”<sup>7</sup> Long-standing Board law demonstrates they have their ordinary meanings, and should not be re-defined to limit the scope of Section 2(11).

1. “Direct” and “Assign” Are Shadings of a Similar Meaning

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<sup>7</sup> Questions 2, 3, and 4 read: (2) What is the difference, if any, between the terms “assign” and “direct” as used in Sec. 2(11) of the Act? (3) What is the meaning of the word “responsibly” in the statutory phrase “responsibly to direct”? (4) What is the distinction between directing “the manner of others’ performance of discrete tasks” and directing “other employees” (emphasis in original)? Kentucky River, at 720.

Reviewing first, as we must, the plain language of the Act, we find that the Section 2(11) characterizes as a “supervisor,” any individual having authority in the interest of the employer to... assign ... other employees, or responsibly to direct them. The dictionary defines “assign” as “to appoint to a post or duty” or “to appoint as a duty or task.” Webster's Revised Unabridged Dictionary, 1996, 1998. Thus, the word may variously mean the assignment of a general responsibility, or the assignment of a particular task. The definition of “direct” as a transitive verb is quite similar. It includes:

- to regulate the activities or course of
- to carry out the organizing, energizing, and supervising of
- to dominate and determine the course of
- to train and lead performances of
- to point, extend, or project in a specified line or course
- to request or enjoin with authority
- to show or point out the way for

Webster's Revised Unabridged Dictionary, 1996, 1998. The sole distinction is that “assign” connotes the issuance of a general order, while “direct” connotes closer supervision. §2(11) includes both but modifies “direct” with the word “responsibly.” It is clear that the Act contemplates the issuance of general orders to be supervisory. What effect does “responsibly” have on “direct?” The dictionary defines “responsible” to mean “liable to be called on to answer,” and “marked by or involving responsibility or accountability.” *Id.*

## 2. The Drafter of “Responsibly to Direct” Defined the Term

One directs “responsibly” if he is to be held accountable for the work of subordinates. A further description was provided by the Senator who coined the term. As originally drafted, Section 2(11) did not contain the words “or responsibly to direct.” Senate Bill 1126, 1947. They were added during floor debate upon the request of Vermont Senator Ralph E. Flanders. Senator Flanders explained his reason for the addition:

... I can say that the definition of "supervisor" in this act seems to me to cover adequately everything except the basic act of supervising. Many of the activities described in paragraph (11) are transferred in modern times to the personnel manager or department. The supervisor may recommend more or less effectively, but the personnel department may, and often does, transfer a worker to another department on other work instead of discharging, disciplining, or otherwise following the recommended action.

In fact, under some modern management methods, the supervisor might be deprived of authority for most of the functions enumerated and still have a large responsibility for the exercise of personal judgment based on personal experience, training, and ability. He is charged with the responsible direction of his department and the men under him. He determines under general orders what job shall be undertaken next and who shall do it. He gives instructions for its proper performance. If needed, he gives training in the performance of unfamiliar tasks to the worker to whom they are assigned.

Cong. Record, Senate May 7, 1947, p. 1303.<sup>8</sup> Senator Flanders' characterization of the then-modern workplace is only more convincing today. The National Labor Relations Board had little difficulty in applying this common sense description of "responsibly to direct" for many years, even in the health care industry.

3. The Board Historically Applied the "Assign" and "Responsibly to Direct" Criteria in Nursing Facilities Without Supplemental Extra-Statutory Theories

The Supreme Court directed the Board to apply the statute as written, and avoid categorical exclusions such as that of "professional judgment." Kentucky River, 532 U.S. at

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<sup>8</sup> The Board has accepted this definition, both in the past and in recent times. Providence Hospital, 320 NLRB at 725, *citing* Ohio Power Co., 80 NLRB 1334 (1948); *see also* Ohio Power Co. v. NLRB, 176 F.2d 385, 387 (6th Cir. 1949), *cert. denied* 338 U.S. 899 (1949) ("To be responsible is to be answerable for the discharge of a duty or obligation"); Northeast Utilities Service Corp., 35 F.3d 621 (1st Cir. 1994) ("[i]t may profit the Board to reexamine its views" regarding "the quasi-professional, quasi-overseer employee" which neither the Board nor the courts contemplated when they "set upon the task of defining supervisor"); NLRB v. Adam & Eve Cosmetics, 567 F.2d 723, 728 (7th Cir. 1977); NLRB v. Daily News Tribune, 283 F.2d 545, 549-550 (9th Cir. 1960); all cited in Providence Hospital.

721. In *dicta*, the Court expressed that the Board might otherwise lawfully be able to implement its policy aims. “The Board could offer a limiting interpretation of the supervisory function of responsible direction by distinguishing employees who direct the manner of others’ performance of discrete tasks from employees who direct other employees, as §152(11) requires. Certain of the Board’s decisions appear to have drawn that distinction in the past, see, e.g., Providence Hospital, 320 NLRB 717, 729 (1996).” 532 U.S. at 720.

In Providence Hospital, the Board said that nurses directing employees “to perform discrete tasks” was nothing more than the direction of subordinates by a more skilled and more highly trained employee, and thus was not supervisory. 320 NLRB at 729-730. However, the *reason* why their direction was not supervisory was because it lacked the exercise of independent judgment – and the reason it lacked independent judgment was because the Board refused to accept the nurses’ professional judgment as “independent judgment.” *Id.* at 730. This, of course, is the reason which was rejected by the Supreme Court.

Further, it is clear from Board precedent that nurses’ direction of employees often encompasses much more than merely directing “discrete tasks” – and that in so doing nurses exercise independent judgment.

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a. The Board Has Had Several Misinterpretations of Section 2(11)

The Kentucky River dicta did not assess Board law as a whole. As discussed *supra*, prior to the exclusion of “professional judgment,” the Board had an earlier categorical exclusion: the “patient care exception.” The Court corrected this Board misapplication of the Act in the HCR decision. 511 U.S. at 584. Providence Hospital, *supra*, and its companion case Ten Broeck Commons, *supra*, represented a post-HCR extension of the same categorical exclusion: everything previously excluded as “patient care” was now summarily excluded as “routine”

expressions of “professional judgment.” 320 NLRB at 810-11. On the basis that the nurses’ assignment of employees and their tasks were “routine,” the Board held that nurses were leadpersons, and their direction of employee work was not an exercise of independent judgment. *Id.* at 810-811.<sup>9</sup> Providence Hospital and its progeny were *rejected* in Kentucky River. The Board should not make the error of reading the Court’s *dicta* in Kentucky River as permitting a test which micro-analyzes the type of direction exercised.

b. The Avon Convalescent Line of Cases: Pure Application of the Act

Prior to the development of the Board’s categorical exclusions, the NLRB regularly found that nurses’ direction of employees satisfied the statutory test. *See, inter alia*, Avon Convalescent Center, 200 NLRB 702, 706 (1972) *enfd.*, 490 F.2d 1384 (6th Cir. 1974), and Rockville Nursing Center, 193 NLRB 959, 962 (1971).<sup>10</sup> NLRB decisions had indeed recognized that supervising the work of nurses aides in the administration of patient care services qualified an LPN as a supervisor under the Act. University Nursing Home, 168 NLRB 263, 264 (1967). Assigning patient care duties to nursing assistants was also indicative of supervisory status. Autumn Leaf Lodge, 193 NLRB 638, 639 (1971), *enfd.*, 462 F.2d 575 (5th Cir. 1972)

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The Board’s findings were not inadvertent. Indeed, the Board specifically explained why such duties were supervisory:

In a nursing home servicing elderly and sick patients whose critical needs may momentarily require variations in standard procedures, the nurse responsible for the supervision of other nurses or a shift or a section must obviously be prepared to exercise her discretion

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<sup>9</sup> Subsequently, the Board rendered identical holdings. *See* Washington Nursing Home, Inc., 321 NLRB 366 (1996); Parkview Manor, 321 NLRB 477 (1996); Altercare of Hartville, 321 NLRB 847 (1996); and Rest Haven Nursing Home, 322 NLRB 210 (1996).

<sup>10</sup> Because these cases were contrary to the patient care standard then in effect, the Board expressly overruled them in Northcrest Nursing Home, 313 NLRB 491, n.12 (1993). However, Northcrest’s overruling of these cases was based on the Board’s now-discredited theory. 320 NLRB at 737. Indeed, following HCR, it is Northcrest that is now overruled.

in utilizing her training and experience and assign and direct employees placed under her authority more than clerically or routinely.... Although the record does not establish that the nurses here in question hire, fire, or mete out discipline or directly recommend such action, their power to enforce major personnel policies and rules ... is compelling evidence that their direction and assignment of employees is substantial and meaningful...

...[E]ach of the ... nurses concerned was at all material times a supervisor, as defined in Section 2(11) of the Act because she had authority in the interest of the [employer] to "assign" and "responsibly to direct" other employees, as comprehended by that section.

Avon Convalescent, 200 NLRB at 706, *see also* Autumn Leaf Lodge, 193 NLRB at 639, and University Nursing Home, 168 NLRB at 264. The Board recognized that nurses' involvement in the disciplinary process indicated supervisory status. Autumn Leaf Lodge, 193 NLRB at 639 (recommended nursing assistants for termination); Rosewood, Inc., 185 NLRB 193, 194 (1970) (power to discipline nursing assistants). Moreover, so did the power to enforce policies of the employer through disciplinary measures. Avon, 200 NLRB at 706 (personnel policy empowered nurses to enforce rules, and they were authorized to "write up" nursing assistants for violations).

The ability to transfer employees to different jobs was held indicative of supervisory status. Avon, 200 NLRB at 706; Autumn Leaf, 193 NLRB at 639. Also supervisory was the authority to permit employees to leave early; New Fairview Hall Convalescent Center, 206 NLRB 688, 749 (1973), *enfd.*, 520 F.2d 1316 (2d Cir. 1975); Rosewood, 185 NLRB at 194; or to excuse lateness. New Fairview, 206 NLRB at 749. Nurses who adjusted schedules, or assigned meal and break periods were also deemed supervisors. New Fairview, 206 NLRB at 749; Avon, 200 NLRB at 706. The power to adjust time cards was deemed a supervisory function. New Fairview, 206 NLRB at 749. The Board held that the authority to call in employees to ensure staffing was indicative of supervisory status, Garrard Convalescent Home,

199 NLRB 711, 717 (1972), *enfd.*, 489 F.2d 736 (6th Cir. 1974); as was the preparation of employee evaluations. New Fairview, 206 NLRB at 749; Doctors' Hospital, 175 NLRB 354 (1969). Where nurses adjusted employee grievances, they were deemed supervisors. New Fairview, 206 NLRB at 749.

This clear and understandable application of Section 2(11) held sway until the rise of the “patient care” and the “professional judgment” theories of the 1980s and 90s. Prior to Kentucky River, Board Member Cohen decried the Board’s abandonment of Section 2(11)’s plain application. In his notable dissent in Providence Hospital, he acknowledged both the Avon rationale and Senator Flanders’ articulation of the meaning of “responsible direction.” He said:

...in an effort to transform charge nurses into employees, my colleagues have ignored the substantial degree of independent judgment which charge nurses possess. Charge nurses are not automatons who carry out their functions by rote. The essence of their job is judgment.

Providence Hospital, 320 NLRB at 737, (Cohen, *dissenting, citing*, Beverly California Corp v. NLRB, 970 F.2d 1548, 1553 (6th Cir. 1992)). Mr. Cohen was right. The only legitimate and legally sound interpretation of the law is one that applies it as intended - any party aggrieved by the results can ask Congress to amend the Act. “Responsible direction” is the act of general oversight of employees, as described by Senator Flanders, Board Member Cohen, and the NLRB in cases such as Avon Convalescent and its progeny.

4. “Leadpersons” Are Employees Whose Authority over Others Fails to Meet the “Responsible Direction” Standard

Board decisions often characterized those who possess less than the requisite statutory authority as “leadpersons.” Williamette Industries, Inc., 336 NLRB No. 59 (Oct. 1, 2001); Chrome Deposit Corp., 323 NLRB 961 (1997). The concept arises from the 1947 Senate Com-mittee report on the bill, in which it described those *not* included under the Act: “straw

bosses, leadmen, set-up men, and other minor supervisory employees.” Senate Report No. 105, 80th Cong., 1st Sess., 4 (1947) *reprinted in* Leg. History of the LMRA, 1947, 304 (1974). The location of the dividing line between §2(11) supervisors and leadpersons is again at issue.<sup>11</sup> The question is a fair one, and it has troubled the Board in the past.

The authoritative statement on the subject is that of Senator Flanders, upon the adoption of the “responsibly to direct” phrase in Section 2(11), cited *supra*. Flanders said the supervisor has “a large responsibility for the exercise of personal judgment based on personal experience, training, and ability. He is charged with the *responsible direction* of his department... He determines *under general orders* what job shall be undertaken next and who shall do it.” Cong. Record, Senate May 7, 1947, p. 1303 (emphasis added). The supervisor also instructs and trains employees. *Id.* The Senator further stated

Such men are above the grade of “straw bosses, lead men, set-up men, and other minor supervisory employees”... their essential managerial duties are defined by the words, “direct responsibly,” which I am suggesting.

Cong. Record, Senate May 7, 1947, p. 1303 (emphasis added). The Senator’s words describe the ~~actual distinction between supervisors and leadpersons: supervisors use “personal judgment” to~~ “responsibly direct” employees under “general orders.” This is yet another example of the Act’s inter-connected character - put another way, the supervisor is the employee who, pursuant to general managerial guidelines, is accountable for using his or her *independent judgment* in

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<sup>11</sup> Question number 9 in the Board’s Notice and Invitation to File Briefs reads: What functions or authority would distinguish between “straw bosses, leadmen, set-up men, and other minor supervisory employees,” whom Congress intended to include within the Act’s protections, and “the supervisor vested with “genuine management prerogatives.” NLRB v. Bell Aerospace Co., 416 U.S. 267, 280-281 (1974)(*quoting* Senate Report No. 105, 80th Cong., 1st Sess., 4) (1947).

directing others. The would-be supervisor who lacks the adequate degree of discretion, or who uses only minimal judgment, is a leadperson.

This is consistent with Board cases in which a reputed supervisor's authority is limited to simply "directing" employees the way a journeyman would an apprentice, Debber Electric, 313 NLRB 1094 (1994), or merely assign and direct other employees in order to assure technical quality of the job, Brown & Root, Inc., 314 NLRB 19 (1994). *See also* Chrome Deposit Corp., 323 NLRB 961 (1997) (finding that crew leaders who assign employees based largely on manager generated schedules are not supervisors); J. C. Brock Corp., 314 NLRB 157, 158 (1994) (no supervisory status found where leadpersons primary duty is to keep production moving).

However, in the years since the passage of Section 2(11), the Board has at times allowed the definition of a leadperson to swallow the statutory definition of "supervisor." For instance, in Kentucky River, the Board contended that the leadperson description applied to nurses because their authority was based on their greater experience and skills - experience and skills which were informed by professional judgment, which the Board held was not "independent" within the meaning of Section 2(11). 532 U.S. at 713. The Court, besides rejecting the "professional judgment" exclusion, also rejected the Board's leadperson analogy:

The breadth of this exclusion is made all the more startling by virtue of the Board's extension of it to judgment based on greater "experience" as well as formal training. See Reply Brief for Petitioner 3 ("professional or technical skill or experience"). What supervisory judgment worth exercising, one must wonder, does not rest on "professional or technical skill or experience"? If the Board applied this aspect of its test to every exercise of a supervisory function, it would virtually eliminate "supervisors" from the Act.

532 U.S. at 714-15. Remember also, that Senator Flanders' very description of "responsible direction" contemplated the supervisor as one who utilized his own experience as a tool for exercising discretion. *See supra*, Cong. Record, Senate May 7, 1947, p. 1303.

D. The Question of Part-Time Supervision

Another common problem found in these cases is the issue of the employee who possesses truly supervisory authority, but is employed as a supervisor only a portion of the time.<sup>12</sup> How often must the employee work in the supervisory position to establish that he or she is covered by Section 2(11)? This issue commonly arises under two factual scenarios: (1) the employee who serves as supervisor only infrequently when the “official” supervisor is on vacation or is otherwise absent, and (2) where several employees rotate into the supervisory position on a regular basis. Board law provides the tools for analysis.

The question is whether an employee who has *part time* possession of the requisite authority is a supervisor. The statute is clear. Possession of the authority is all that is required to satisfy Section 2(11). However, for good legal and practical reasons, an individual cannot be an “employee” under the Act, but on certain days a “supervisor.” Analysis of this issue begins with the reason for Section 2(11)’s existence: Congressional recognition of the need to exclude supervisors from the ranks of employees. With this in mind, the Board should focus on both the authority carried by the *position* and the extent of the time each putative supervisor spends in that position.

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It is well established that an employee who substitutes for a supervisor may be deemed a supervisor only if that individual’s exercise of supervisory authority is both “regular and substantial.” Hexacomb Corp., 313 NLRB 983, 984 (1994). The test should not be rote - if

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<sup>12</sup> Questions numbered six and seven read: (6) What are the appropriate guidelines for determining the status of a person who supervises on some days and works as a non-supervisory employee on other days? (7) In further respect to No. 6 above, what, if any, difference does it make that persons in a classification (e.g., RNs) rotate into and out of supervisory positions, such that some or all persons in the classification will spend some time supervising?

the position is truly a supervisory job, then all who *regularly* fill that job should be considered “supervisory.”

The Board’s primary (and appropriate) concern is to avoid conferring §2(11) status upon those with mere “paper” authority. East Village Nursing and Rehabilitation Center, 324 NLRB No. 93 (Sept. 30, 1997). The Board should first analyze the putative supervisory position. A showing that individuals serving in that position have exercised this authority (or have otherwise demonstrated its possession) will establish that it is a supervisory position. If so, the position is supervisory, and the employer’s interest in maintaining the status of the position is protected by the Taft-Hartley amendments. The Congressionally-recognized employer need to rely on the loyalty of the supervisors is not diminished because the supervisors share possession of the authority.

Next, the Board should consider the putative supervisors. When each putative supervisor acts in that capacity, do they possess the same supervisory responsibilities? In assessing this, the Board should take care to note that where different employees rotate into the job, it is natural that not all will have equal *opportunities* to *exercise* supervisory authority.

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However, where it is established that participants in the position actually possess supervisory power, those who simply exercise that authority with less frequency than others should not be deprived of supervisory status.

Lastly, the Board should consider the frequency with which each putative supervisor works in the supervisory job. The essential test for determining the status of employees who substitute for supervisors is “whether they spend a regular and substantial portion of their working time performing supervisory tasks.” Latas De Aluminio Reynolds, 276 NLRB 1313 (1985); Gaines Electric Co., 309 NLRB 1077, 1078 (1992); Canonie Transportation,

289 NLRB 299, 300 (1988); Aladdin Hotel, 270 NLRB 838, 840 (1984).

Where it is not on a regular basis, or is on too few occasions, supervisory status will not be found. Carlisle Engineered Products, Inc., 330 NLRB 1359 (2000) (several employees rotate into one supervisory job only one shift per week); St. Francis Medical Center-West, 323 NLRB 1046 (1997) (substitution only when supervisor is on vacation two times in two years is too sporadic and limited). Where the employee serves as a supervisor only when the usual supervisor is unexpectedly absent, supervisory status will not be found, because the exercise of supervisory authority is not regular. Brown & Root, Inc., 314 NLRB 19 (1994). If the assumption of supervisory responsibility is temporary, caused by unusual circumstances, and it is unlikely to recur, not supervisory. St. Francis Medical Center-West, *supra*; *see also* OHD Service Corporation, 313 NLRB 901 (1994) (supervisor status was temporary and limited to one season; caused by unusual and unforeseen circumstances, no indication it would occur again).

However, supervisory status will be found where a putative supervisor substitutes for the usual supervisor on a regular basis. For instance, in Inland Steel Co., 308 NLRB 868 (1992), employees substituted for a supervisor on a regular basis during vacations, sick days, and on his days off during the week, “constituting between 40-45 times per year,” or for each employee, “as many as 15 times annually.” *Id.* at 883. Under those circumstances, employees served as supervisors “not on a sporadic, but rather on a regular basis.” *Id.*; *see also* Honda of San Diego, 254 NLRB 1248 (1981).

The analysis to be used in response to questions six and seven is the same: it is irrelevant if the putative supervisors are substitutes when an “official” supervisor is absent, or whether there the supervisory position rotates among several or all employees. The Aladdin Hotel - Inland Steel test applies. Where a position is supervisory, as determined by its duties and

responsibilities, *any* individual who serves in that position is a supervisor under the Act, provided (1) he actually possesses the supervisory authority during the period he serves in the position, (2) he serves on a regular recurring basis; and (3) the frequency is adequate to show more than *de minimis* participation.<sup>13</sup> Where there is a rotating body of supervisory employees, only those individuals satisfying the test will be deemed supervisory; it would be expected that in some instances, the supervisory function would be held more often by some than others. Those whose participation is lesser will not be supervisory if their frequency is comparatively slight or so irregular as to be unpredictable.

E. "Modern Management Methods" Will Evolve; But Only Congress May Amend the Act

The Board has asked for comment on interpreting the Act in light of changes in the modern workplace such as worker autonomy and self-directed work teams.<sup>14</sup> The way we work has changed greatly, and it will continue to change. The Act, however, was born of the 1930s factory model of employment. The Act's drafters did not foresee telecommuting, the service economy, or self-regulating employees. The leading edge of employment design, and the one most theoretically troubling for the Act, is participative management.<sup>15</sup>

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<sup>13</sup> There are no specified minimum number of occasions which will trigger supervisory status. Inland Steel teaches that 15 times in one year sufficed. The Board will have to assess the totality of the circumstances in a case-by-case analysis. Laser Tool, Inc., 320 NLRB 105, 108 (1995) (fill in for supervisor once a week was not sporadic); *see also* DST Indust., 310 NLRB 950, 958 (1993) (supervisory authority not lost because infrequent exercise of that authority).

<sup>14</sup> Question eight reads: To what extent, if any, may the Board interpret the statute to take into account more recent developments in management, such as giving rank-and-file employees greater autonomy and using self-regulating work teams?

<sup>15</sup> In a typical participative management structure, concepts such as "supervisor" and "subordinate" do not exist. "Management" is limited to the corporate business hierarchy. Production facilities are run by teams of extensively cross-trained employees who can perform a variety of functions, and have been trained to fully understand the business of the employer, the role of their facility, and their roles as team members. A small group of facilitators maintain records and act as liaison between corporate interests and the plant staff.

In a full-fledged participative management structure, the Act has only marginal relevance. Collective bargaining is contrary to the structure of their employment, since employees are both "labor" and "management." Where every employee has authority to effectively recommend discipline, discharge, hire, and promotion, every employee may fit the definition of "supervisor." It does not appear the Board has yet been asked to address this issue in such a facility.

Although the Act is ill-equipped to handle an advanced organization as described above, there are very few employers which have actually implemented a successful program along these lines. Nonetheless, elements of participative management appear in the nature of self-directed work teams. Application of Section 2(11) in such an environment requires the same analysis as described above. What decisions do the employees make within their self-directed team? Generally, these decisions will be limited to the "assign" and "responsible direction" elements.

As stated *supra*, the first inquiry would be the nature of their decision-making authority. Does the team have the discretion to make decisions alone, or is their authority constrained by close work rules? Does the extent of their authority impact any of the 2(11) criteria? What is the impact of their unilateral decisions upon employees, and upon the employer's business?<sup>16</sup>

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Many plant decisions (including production goals, staffing, and even manufacturing methods) are made by employees in a "town meeting" style. Decisions are made by employee consensus. Leaders of teams (if any) are elected by employees. Employee compensation depends in large measure on their production and plant profitability. Work assignments are determined by team agreement. Employees are expected to know several jobs. Discipline and discharge are issues which implicate the welfare of the team, and are therefore decided upon by employee vote. Hiring involves multiple team members and a vote of the team itself.

<sup>16</sup> Assuming the team satisfies these tests, each employee member of the team should be reviewed to ensure that they truly participate in the decision-making process.

It is quite possible that the authority of a group will be limited to the execution of relatively small tasks. If the decisions are limited to subjects such as to how to load or unload a truck, it is likely to implicate only very low levels of discretion. The impact on employee terms of work, and the employer's business would also be minimal. Application of the standard tests should apply.

F. Secondary Indicia Are Important Tools in Close Cases

The Board seeks comment upon the proper application of so-called "secondary indicia."<sup>17</sup> Secondary indicia are facts which tend to show either supervisory or non-supervisory status. Secondary indicia cannot be the basis for a finding of supervisory status. Carlisle Engineered Products, Inc., 330 NLRB 1359 (2000). It follows *a fortiori* that secondary indicia cannot defeat a showing of actual possession of supervisory authority. Ken-Crest Services, 335 NLRB 777, 779 (2001). However, the Board has often used secondary indicia in reaching a decision on disputed statutory facts. D & T Limousine Service, Inc., 328 NLRB 769, 778 (1999). Sound reasoning supports this.

The Board is charged with the responsibility of assessing the facts as they are.

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Hicks Oil, Hicks Gas, 293 NLRB 84, 91 (1989); Purolator Products, 270 NLRB 694 (1984). However, applying Section 2(11) involves multiple subjective analyses. There is an inherent risk of an overly academic result - one that does not capture the reality of the workplace. Further, in many cases decisions whether directions are "routine" or whether the judgment used is truly "independent" are close questions. The so-called secondary indicia offer guideposts to the Board. The presence (or absence) of secondary indicia assists the fact finder. They provide a

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<sup>17</sup> Question ten reads: To what extent, if at all, should the Board consider secondary indicia- for example, the ratio of alleged supervisors to unit employees or the amount of time spent by the alleged supervisors performing unit work, etc.-- in determining supervisory status?

reality check. They can inform the Board's assessment of the facts.<sup>18</sup> While the Board cannot render a finding based on secondary indicia, it has not considered the evidence as a whole unless it acknowledges and discusses the impact (or lack thereof) of the indicia.

The Board has considered secondary indicia in many cases. In the health care field, the Board has relied on secondary indicia to guide their analysis of statutory factors. For instance, the Board acknowledged that in many facilities nurses are the highest-ranking employee a majority of time. Autumn Leaf Lodge, 193 NLRB at 638-639; Clark Manor Nursing Home Corp., 254 NLRB 455, 477-78 (1981), *enfd, in part, rev'd*, 671 F.2d 657 (1st Cir. 1982). While this is not a statutory criteria, it represents the practical reality that a skilled nursing facility cannot be "unsupervised." Beverly Enterprises, Virginia, Inc. v. NLRB, 165 F.3d 290 (11th Cir. 1999); Cedar Ridge Nursing and Rehabilitation Center v. NLRB, 147 F.3d 333 (4th Cir. 1998); Grancare, Inc. v. NLRB, 137 F.3d 372 (6th Cir. 1998); NLRB v. Beacon Light Christian Nursing Home, 825 F.2d 1076 (6th Cir. 1987).<sup>19</sup> A related issue is the ratio of supervisors to employees. Garney Morris, Inc., 313 NLRB 101 (1993). If nothing else, these are facts that should weigh heavily in any assessment of the amount of discretion possessed by the putative supervisor, and the degree to which she "responsibly" directs employees.

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<sup>18</sup> For instance, where there is a question of whether the would-be supervisor is actually imbued with "true managerial prerogatives" in the direction of others, ambient facts such as a job description detailing supervisory authority, supervisory training, a higher pay scale, and more would be helpful to the decision-maker as they strongly suggest supervisory status.

<sup>19</sup> The lack of other supervision in other industries has also often been recognized as an indicator of likely supervisory status. *See* Empress Casino Joliet Corporation v. NLRB, 204 F.3d 19 (7th Cir. 2000); American Diversified Foods, Inc. v. NLRB, 640 F.2d 893 (7th Cir. 1981); Kenner Rubber, Inc. v. NLRB, 326 F.2d 968, 969-70 (6th Cir. 1964), *cert. denied*, 377 U.S. 934 (1964); D & T Limousine Service, Inc., 328 NLRB 769 (1999); Essbar Equipment Company, 315 NLRB 461 (1994); Color Decorator Products, 228 NLRB 408, 410 (1977), *enfd, without op.*, 582 F.2d 1289 (9th Cir. 1978).

The portion of time a reputed supervisor performs unit work is worthy of consideration, although clearly not dispositive. If an employee possesses supervisory authority, it is irrelevant that he or she spends a large degree of time performing the same work employees perform. The Atlanta Newspapers, 306 NLRB 751 (1992); *see also* Laser Tool, Inc., 320 NLRB 105 (1995). However, in a close case, it may also suggest the employee's authority is less than supervisory.

There are numerous other indicia which also suggest supervisory status. Receiving higher pay, or better benefits than other employees is one. NLRB v. Prime Energy Limited Partnership, 224 F.3d 206 (3d Cir. 2000); American Commercial Barge Line Company, 337 NLRB No.168 (Aug. 1, 2002); Belle Knitting Mills, Inc., 331 NLRB 80 (2000); Laser Tool, Inc., 320 NLRB 105 (1995); K.B.I. Security Services, Inc., 318 NLRB 268 (1995); Essbar Equipment Company, 315 NLRB 461 (1994); DST Industries, Inc., 310 NLRB 957 (1993); Doctors' Hospital, 175 NLRB 354 (1969). It is a factor suggesting the employer intends the putative supervisor to rank above other employees.

The employer's clear and expressed intent that particular parties be supervisors is also a significant indicator. Clearly, where an employer trains certain employees to be supervisors, and provides them with job descriptions which detail true supervisory responsibilities, there is at least a strong suggestion the individuals *are* supervisors. In Avon Convalescent Center, *supra*, 200 NLRB at 706 (1972), the Board analyzed nurses' authority as portrayed in the employer's policy manuals. In finding that the nurses in Avon were supervisors, the Board noted:

Any question of the power of [the nurses] responsibly to direct other employees and to assign them -- substantially, and not routinely -- is convincingly answered by the [employer's]

“Policies, Rules and Regulations for Non-Professional Personnel,” contained in a document which has been referred to above.

... The document's last marginal heading is “Supervision,” beside which is the following declaration: “Those designated by Administrator along with the nursing staff shall enforce Policies, Rules and Regulations and Job Descriptions.” Next to the marginal title, “Schedules,” appears: “Work assignments and schedules are posted in the nurses station on the floor you are assigned. You are responsible to the floor supervisor and to the Administrator and/or his assistants. Lunch times are posted. Report to the floor supervisor when going to and returning from lunch.” And beside the marginal heading, “Job Assignments,” is the wording: “Employee must follow assignment of duties schedule as it pertains to shift and job category covered and nurse supervisor's directions.”

200 NLRB at 706; *accord* Wedgewood Health Care, 267 NLRB 525, 526 n.11 (job description, personnel manual, and oral communications with employees explained that nurses were supervisors whose instructions must be followed); and Northwoods Manor, Inc., 260 NLRB 854, 855 (1982) (employees told on hire that nurse is their supervisor); Helena Laboratories Corp., 225 NLRB 257, 265 (1976), *mod.* 557 F.2d 1183 (5th Cir. 1997) (employer held employee out to be supervisor); Broyhill Co., 210 NLRB 288, 294 (1974), *enf'd* 514 F.2d 655 (8th Cir. 1975).

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*See also* Schnuck Markets, *supra*, 961 F.2d at 706.<sup>20</sup>

Also instructive is whether putative supervisors attend management meetings or training sessions regarding supervisory responsibilities. McClatchy Newspapers, Inc. Publisher of the Sacramento Bee, 307 NLRB 773 (1992); Avon, 200 NLRB at 705; Times Herald Printing Co., 252 NLRB 278, 283 (1980); U.S. Postal Service, 302 NLRB 701, 703 (1991). Further,

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<sup>20</sup> Of course, mere “paper authority” which the employer has never actually given to the asserted supervisors, or has not informed them of it, or that has never been used will not satisfy the test. East Village Nursing and Rehabilitation Center, 324 NLRB No. 93 (Sept. 30, 1997); Chevron U.S.A., 309 NLRB 59 (1992); Sears, Roebuck & Co., 304 NLRB 193 (1991). However, where there is a question of whether the evidence of 2(11) authority is adequate, the existence of employer memoranda directing supervisory responsibilities can be illustrative.

would-be supervisor training of employees may also indicate statutory status. Empress Casino Joliet Corporation v. NLRB, 204 F.3d 19 (7th Cir. 2000); K.B.I. Security Services, Inc., 318 NLRB 268 (1995).

Secondary indicia are an important tool for the interpretation of close facts. While they will not substitute for true statutory indicia, where they present the ambient suggestion that the putative supervisors satisfy the statutory test, they must not be ignored. They must be considered, and their influence (or lack thereof) upon the analysis of the statutory criteria should be explained.

### III. Application of the Appropriate Standard to the Cases at Bar

This section of the brief will review the cases, in light of the foregoing recommended analyses. Our review is based on the parties' briefs and the Regional Directors' decisions, and will suggest conclusions for the Board based on the recommended analyses.

#### A. Oakwood Healthcare

The Heritage, Oakwood Hospital ("Oakwood") is one of four acute care hospitals owned by Oakwood Healthcare, Inc. Oakwood has 257 licensed beds and eight separately functioning units. There is a Nursing Site Leader responsible for the entire facility, clinical and assistant clinical managers for each unit and charge nurses for each shift. Most charge nurse positions are filled by RNs on a rotating basis. At issue here is whether the charge nurses are "supervisors" based on their authority to assign and responsibly direct subordinate employees. Also, since most charge nurse positions are filled by a rotation of RNs, there is the question of whether the rotation impacts their status. The Regional Director determined that neither the registered nurses nor the charge nurses exercised independent judgment in their assignment and direction of employees. (Oakwood at 20).

Application of the recommended analyses would likely result in a finding of Section 2(11) status for all charge nurses.<sup>21</sup> Nurses' rotation into the position does not diminish their regular and recurring possession of supervisory authority.

1. The Facts Show that Oakwood Charge Nurses Exercise Independent Judgment

As detailed *supra*, the recommended tests for independent judgment are the *nature* test and the *impact* test. To satisfy the *nature* test, the discretion must be unilaterally exercised, and reflect a degree of cognitive effort greater than merely following pre-established management directives. The *impact* test requires satisfaction of two factors: (1) whether the nurses' judgment impacts any of the twelve Section 2(11) criteria, and (2) whether the nurses' decisions have more than minimal significance to the employer's business, or upon the conditions of their subordinates' employment.

It is clear from even the Regional Director's decision that the *nature* of the judgment exercised by Oakwood charge nurses is unilateral and requires a cognitive effort beyond the mere following of pre-established directives.

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A primary function of the charge nurses is the direction all of the staff on their unit, which includes subordinate RNs, LPNs, Nursing Assistants, GNs, NEs, mental health workers, and secretaries. In directing staff, charge nurses must determine the order tasks are to be completed, who shall perform the task, provide instructions for the proper performance of the task and, if needed, give training to those unfamiliar with the assignment.

Charge nurses make unilateral judgments on a number of factors including: a patient's acuity level (e.g., the level of self-care the patient can provide, the illness involved and

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<sup>21</sup> The employer below asserted that its charge nurses were supervisors, but not its registered nurses acting in their capacity as RNs. The facts, however, could support supervisory status for both the charge nurses and to a lesser degree, the RNs as well.

the medical attention required to meet the needs of that illness), the patient's need for care, the type of care required, the relative abilities, experience, and skills of subordinate employees; most importantly, they assign and direct employees to render the care they determine necessary. These decisions are made continually by charge nurses, as new admissions arrive, patients are discharged or transferred, and employees are floated between floors, and acuity levels fluctuate. In fact, staff nurses and aides are required to inform their charge nurse of any of these changes. Charge nurses may assign a different number of patients they to each staff member, and may reassign staff who do not meet the patients' needs.<sup>22</sup>

Charge nurses determine staff meal and break periods, which is particularly important in an acute care facility requiring maintenance of high levels of staffing. In so doing, charge nurses must consider the relative skill levels of the employees, the number of employees left on the floor, and the acuity of the patients that the departing employee was assigned. Charge nurses assign unit employees to specific tasks, such as completing narcotic counts, checking the "crash cart" and confirming shift reports. The charge nurses continually make judgments matching the employer's manpower resources to the work – and to the projected work for the remainder of the shift.<sup>23</sup>

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<sup>22</sup> The Oakwood decision inappropriately relies on the relatively brief amount of time charge nurses dedicate to making patient assignments as an indicator of their alleged lack of discretion. However, the realities of the workplace require assignments be made quickly and do not in any way undermine the discretion a charge nurse wields or the importance of those decisions.

<sup>23</sup> Charge nurses are designated and act as the first step in the employer's employee problem solving procedure. Subordinate employees are instructed to take all of their work-related issues/complaints to their charge nurse. Charge nurses attempt to remedy the situation by reassigning one of the individuals involved or providing some other form of direction to the parties. The problem-solving procedure only informs employees to bring their problems to the nurse – it does not direct the nurses as to how they will solve the problem.

The Acting Regional Director's decision characterized the existence of policy manuals as follows:

For every task performed by an RN, there is a very specific policy and procedure in writing. These procedures are available for review by the RNs in their work area; however, some of the more experienced RNs do not need to refer to the policies and procedures on a regular basis due to their length of experience. The limited authority of RNs to assign discrete tasks to less skilled employees, based on doctor's orders, hospital policy and procedures or standing orders, or what is dictated by their profession, does not require the use of independent judgment in the direction of other employees.

(Oakwood at 19). The decision reduces the nurses' discretion to rote administration of standing orders. If correct, Oakwood's charge nurses fail the *nature* test. Cited by the decision are Dynamic Science, Inc., 334 NLRB No. 57 (June 27, 2001) (putative supervisors at a hyper-regulated weapons testing facility); Byers Engineering Corp., 324 NLRB 740 (1997) (would-be supervisor doled out field assignments for utility work based on fairness and equal distribution); and Chevron Shipping Co., 317 NLRB 379, 381 (1995) (all incidents requiring changes in orders had to promptly be reported to management). These decisions are inapposite, as they do not at all assess the judgment made by the charge nurses (and indeed, many RNs) in the facility.

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The employer here correctly asserted that "there is nothing "routine" about directing others in the care of patients. The authority to assign and reassign staff in the care of patients is unquestionably indicative of supervisory authority to "assign" and "responsibly to direct." (Oakwood Brief on Review at 23; *citing* Caremore Inc. v. NLRB, 129 F.3d 365, 369 (6th Cir. 1997), Beverly Health & Rehab. Servs. v. NLRB, Nos. 98-5160, 98-5259, 1999 WL 282695 (unpublished) (6th Cir., April 28, 1999) (direction of staff regarding patient care and transferring staff "constitutes the authority 'responsibly to direct'")). It is hard to fathom, and the record does not establish, how the myriad subjective judgments made by nurses in directing the staff could

possibly be governed by procedure – the procedures are at most guideposts, leaving the charge nurses a good deal of discretion to direct employees.

Further, as the Sixth Circuit indicated, it is “perfectly obvious that the kind of judgment exercised by registered nurses in directing nurse’s aides in the care of patients occupying skilled and intermediate care beds in a nursing home is not ‘merely routine.’” Integrated Health Services v. NLRB, 191 F.3d 703, 711 (6th Cir. 1999) *see also* NLRB v. Attleboro Associates, Ltd., 176 F.3d 154 (3d Cir. 1999) and Beverly Enterprises – Virginia v. NLRB, 165 F.3d 290, 297-98 (4th Cir. 1999).

The charge nurses at Oakwood appear to satisfy the *nature* test by virtue of their loosely constrained unilateral authority. The first leg of the *impact* test is satisfied by the nurses’ discretion with regard to the assignment and responsible direction<sup>24</sup> of their subordinates, clearly within §2(11). The second leg of the *impact* test is satisfied by the fact that charge nurses’ decisions certainly have a more than *de minimis* effect on the operations of the hospital, and upon the conditions of employees’ work.

2. The Rotation of Nurses into the Charge Nurse Position Does Not Diminish their Supervisory Status

The recommended test for supervisory status of a “rotating” position is (1) that the position itself is shown to be supervisory, (2) each occupant has the same authority while in the position, and (3) that each putative supervisor rotate into the position on a regular and recurring basis. Oakwood’s charge nurse position satisfies Section 2(11). There is a charge nurse on duty every shift for each unit. The employer has eleven permanent charge nurses and uses trained, experienced RNs on a rotating basis to fill the remaining charge nurse vacancies. These

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<sup>24</sup> The “responsible direction” test is satisfied by the fact that charge nurses determine the order tasks are to be completed, who shall perform the task, provide instructions for the proper performance of the task and, if needed, give training to those unfamiliar with the assignment.

nurses work from 20% to 40% of their time in the charge nurse capacity.<sup>25</sup> More importantly, every charge nurse (whether permanent or rotating) possess the same authority to make independent judgments that impact the workplace.

3. Secondary Indicia Compels the Logical Conclusion Charge Nurses Have Supervisory Authority

To the extent that there is any doubt of the charge nurses' use of independent judgment in assigning and responsibly directing subordinate employees, the presence of significant secondary indicia leads to the conclusion that they must indeed be supervisors.

Charges nurses are paid considerably more (\$1.50 per hour) than staff nurses due to their performance of vital supervisory functions. The employer trains new RNs on essential charge nurse duties, assigns a preceptor to help them learn the supervisory role, and evaluates all charge nurses on their leadership skills. Further, the employer holds out charge nurses to subordinates as their supervisor, both for direction and for the resolution of employee problems. Charge nurses are the highest ranking employees on the unit floor – clinical managers and assistant clinical managers (the next highest ranking positions) spend little or no time on the day-to-day supervision of the units. Even though the majority of a charge nurse's time is spent on the floor, they engage in substantially less direct patient care activities than regular staff nurses.

If charge nurses are not supervisors, the ratio of staff-to-supervisor is as high as 86-to-1. The decision suggests that if *all* staff nurses were supervisors, the ratio would be unrealistic in the reverse, however, the employer is only contending the few charge nurses on duty at any time are supervisors.

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<sup>25</sup> RN Coffee testified to working 40% of her time as a charge nurse. Similarly, RN Welch works approximately one or two shifts every two weeks as a charge nurse. These amply satisfy the regular and recurring test. See Inland Steel Co., 308 NLRB 868 (1992); Aladdin Hotel, 270 NLRB 838 (1984).

Each of these facts - although not direct evidence of statutory authority - are convincing evidence that these nurses have a special status, consistent with that of a supervisor. These facts, viewed in the reality of a health care institution, render it more credible than not that the charge nurses enjoy supervisory status.

In sum, the charge nurses at Oakwood appear to satisfy the “assign” and “responsibly to direct” elements of Section 2(11), as they satisfy the *nature*, *impact*, and responsible direction tests as outlined *supra*.

B. Golden Crest Healthcare Center

Golden Crest Healthcare Center is a two-floor nursing home (34 beds on the first floor and 46 on the second) in upstate Minnesota. The facility has six acknowledged supervisors, including an Executive Director, Director of Nursing Services, Assistant Director of Nursing Services and three Resident Care Managers. In addition, the twenty-four hour facility operates with eight registered nurses, twelve licensed practical nurses and thirty-six certified nursing assistants. At issue here is whether these nursing home charge nurses are “supervisors” based on their authority to assign and responsibly direct subordinate employees. The Regional Director’s Supplemental Decision in Golden Crest appears to ignore the unilateral nature of the charge nurses’ decisions in directing employees and the impact those decisions have on CNAs’ work conditions and the business of the employer. However, application of the recommended analyses would likely result in a finding of Section 2(11).

1. Golden Crest Charge Nurses Satisfy the Tests for Independent Judgment

The decisions Golden Crest charge nurses are required to make on a daily basis appear to require the use of independent judgment. The unilateral *nature* of this discretion is illustrated in the type of direction given to employees. For instance, charge nurses are respon-

• sible for the redistribution of work, reassignment of employees, instruction of staff on when to leave early/stay late, approval of edited time records and direction of CNAs regarding resident care tasks, personal conduct, and most importantly, the direction of quality patient care.

The Regional Director asserts that the nurses at issue do not have any unilateral discretion, since pre-established managerial guidelines and the subordinate employees' collective bargaining agreement render all nurse decision-making rote. (Golden Crest at p. 4-5). This appears doubtful. Charge nurses call in employees to fill scheduling and emergency vacancies. Regardless of whether an employer policy or labor contract dictates the order in which employees are to be called to work, when a staff shortage occurs charge nurses use their unilateral judgment (by surveying the staff on duty and assessing resident needs) to determine whether or not to call for additional staff. Further, the redistribution of work is not the mere ministerial exercise the Regional Director characterizes it to be; charge nurses make these determinations based on the acuity of the residents and the skill level and experience of the employees involved.<sup>26</sup>

Moreover, the Regional Director's decision makes no mention of the charge nurses direction of *patient care*. This is a significant omission, as it avoids consideration of a significant amount of nurses' authority. It appears that the nurses do use their unilateral judgment in directing the tasks performed by employees - and there is no contention that the care of patients is controlled by a collective bargaining agreement. Thus, the charge nurses would most certainly satisfy the *nature* test, in that they render unilateral decisions, independent of

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<sup>26</sup> The fact that the Assistant Director of Nursing sets the "initial" schedule further supports the discretion of the charge nurses who often are required to amend the ADON's orders based on the available staff for a particular shift. Further, the Board recognizes that the assessment of employee skills is a demonstration of independent judgment. Franklin Home Health Agency, 337 NLRB No. 132 (July 19, 2002); *see also* Brusco Tug & Barge Co. v. NLRB, 247 F.3d 273, 276 (D.C. Cir. 2001).

managerial orders.

The charge nurses also satisfy the *impact* tests, as their discretionary authority touches on several Section 2(11) factors and has more than a *de minimis* effect on both the employer's business and the conditions under which employees work. Charge nurses are responsible for the responsible direction of staff in resident care matters.<sup>27</sup> The quality and efficiency of the services provided to residents is directly related to a charge nurse's ability to monitor residents and maintain appropriate staffing levels. In addition, charge nurses are often the only management representatives on the floor and assume responsibility for compliance with state or local regulations. Employees are affected by charge nurse decisions to the extent (at the very least) their workload may be varied, and their schedules may be changed.

2. Secondary Indicia Strongly Suggest Golden Crest Charge Nurses are Statutory Supervisors

In particularly close cases, such as the instant matter, it is imperative for the Board to consider secondary indicia before determining supervisory status. It is uncontested that Golden Crest's charge nurses are the highest level management representative in the entire facility on evenings and weekends (over 60% of the time). ~~The Supplement Decision maintains~~ the duties of charge nurses on evenings and weekends do not differ from their duties at other times. This analysis fails to recognize that charge nurses consistently exercise independent judgment in every shift they work.<sup>28</sup>

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<sup>27</sup> The nurses also satisfy the "responsible direction" test in that they direct the order tasks are to be completed, who shall perform the task, provide instructions for the proper performance of the task and, if needed, give training to those unfamiliar with the assignment.

<sup>28</sup> The Regional Director rather glibly found that because the Director of Nursing, the Assistant Director, and/or the facility administrator were available by telephone during these shifts the charge nurses did not exercise independent judgment. This proves too much. If the availability of higher management deprives supervisors of their independent judgment, then no

In sum, the charge nurses at Golden Crest appear to satisfy the “assign” and “responsibly to direct” elements of Section 2(11), as they satisfy the *nature*, *impact*, and responsible direction tests as outlined *supra*.

C. Croft Metals

Croft Metals is a Mississippi employer engaged in the production of aluminum and vinyl windows and doors. It employs approximately 350 employees, for which there are 20-25 acknowledged supervisors. At issue are four categories of employees, the lead supervisor, specialty lead, leadperson A, and leadperson B, whom the employer asserts are “supervisors” based on their authority to assign and responsibly direct subordinate employees. The Regional Director’s decision in this matter summarily rejected a litany of supervisory functions asserted to be exercised by these employees. The abrupt and incomplete nature of the Supplemental Decision is further evidenced by the Regional Director’s failure to separately analyze the distinct supervisory positions, which were given only a gloss review without any substantial examination of the pertinent facts.<sup>29</sup>

1. The Employer’s Leadpersons, Load Supervisors and Specialty Leadpersons Exercise Varying Degrees of Independent Judgment

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As explained above, the recommended analysis for determining supervisory independent judgment requires satisfying the *nature* and *impact* tests. To satisfy the *nature* test an employee’s discretion in making employment decisions must be unilateral and engage in a cognitive effort that equals more than the rote application of pre-established policies. In addition, a would-be supervisor must pass the *impact* test which requires: (1) the putative supervisor’s exercised judgment touch on at least one of the twelve § 2(11) factors; and (2) the

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one is a supervisor but them. Further, there is no indication that these managers were contacted for directions given to employees in the care of patients.

<sup>29</sup> In fact, the majority of the Acting Regional Director’s analysis is a review of the load supervisor’s position -- the weakest of the Employer’s three supervisory arguments.

supervisor's decisions must have more than a *de minimis* impact on the employer's business or the employment conditions of subordinate employees.

Leadpersons A and B play a critical supervisory role in the day-to-day operation of the production line(s) they are responsible for. In fact, leadpersons A and B are entrusted with assigning production line tasks to employees based on the employee's skill levels, receiving employee complaints/problems, transferring employees to other positions to increase productivity, participating in employee evaluations, assessing whether additional employees are needed on the production line and assigning the new transfers when they arrive, sending employees home early and effectively recommending: raises, transfers, promotions, discipline (including initiating written warnings), discharge and whether to retain probationary employees. Although "leadpersons" A and B by title, Croft's production line supervisors use self-directed discretion that far exceeds the *de minimis* standard.<sup>30</sup>

Croft's specialty leadpersons work in three departments (tool room, extrusion, and maintenance). The maintenance department has approximately 20 employees, 1 acknowledged supervisor and 4 specialty leadpersons. (Croft Metals Brief on Review at p. 12). The specialty leadpersons are responsible for the work and the crew on small construction projects (the large projects are supervised by the acknowledged supervisor), which include supervising and directing the work of the crew members assigned to the project. The discretion engaged in by maintenance department specialty leadpersons is unilateral in nature and is not constrained by pre-established policies.<sup>31</sup>

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<sup>30</sup> The Regional Director's decision does not purport that Croft supervisors' decisions are controlled by pre-existing management guidelines.

<sup>31</sup> The record below is vague and inconclusive regarding details relevant to the assessment of independent judgment exercised by the tool room and extrusion department specialty leadpersons. Thus, only the maintenance specialty leadpersons will be discussed.

Conversely, the record provided appears to indicate that load supervisors do not satisfy the *nature* test, as the only supervisory task asserted by the employer (instructing others how to load trucks) appears purely routine in nature, and relies on the predetermined load manifests and delivery schedules for providing employee direction. Thus, load supervisors do not exhibit independent judgment, are not “supervisors” under the Act.

The remaining putative supervisors (leadpersons A and B, and the maintenance specialty leadpersons) must also pass the *impact* analysis. All of them pass the first leg of the *impact* test in that their unilateral judgment is directed to their assignment and responsible direction of staff.<sup>32</sup> With regard to the second leg (the impact of their unilateral judgments on either the employer’s business or the terms and conditions of subordinate employees’ work), the putative supervisors here have a less well-defined effect. With regard to the A and B leadpersons, while the quality and the quantity of merchandise produced by their subordinate employees certainly has an impact on the employer, it is not clear that it is to the degree nurses’ direction of patient care has for their respective employers. It is also not clear to what extent the impact of their judgments actually affect employee conditions, other than the fact of transfers from task to task. The same is true of maintenance specialty leadpersons, as their work with “small projects” does not clearly have any more than minimal impact on the employer. Nor is it clear the extent to which their ability to assign work meaningfully impacts employee working conditions. It is clear that in each case, there is *some* impact, but whether or not it exceeds a minimal level is not certain.

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<sup>32</sup> Leadpersons A and B satisfy the responsible direction test in that they are accountable (and are subject to discipline) for the performance of their units. It is not clear from the record if that is true of the maintenance specialty leadpersons; however, those employees do determine the tasks to be undertaken by subordinate employees, as well as who will perform the tasks.

2. Secondary Indicia Suggest that Croft Leadpersons and Specialty Leadpersons are Supervisors Under the Act

This is a case in which secondary indicia may be particularly useful in interpreting the facts in analyzing independent judgment.

The A and B leadpersons enjoy higher pay than their subordinate employees. They only infrequently perform the work of their subordinate employees; they have offices which they share with admitted supervisors. They provide training for their employees. The employer has prepared job descriptions which articulate supervisory duties; they are held out as supervisors.

The maintenance specialty leadpersons also receive higher pay than their subordinates. If they are not supervisors, then no one supervises their work teams. The maintenance supervisor (to whom the leads report) would be the one supervisor for 20 employees. If the leadpersons are supervisors, the ratio would be a more manageable 1::4, supervisors to employees.

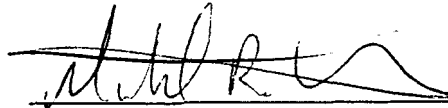
These factors strongly suggest that the A and B leadpersons, as well as the ~~maintenance specialty leadpersons are supervisors. We believe these facts should militate~~ toward interpreting the facts to indicate supervisory status.

IV. Conclusion

The foregoing represents the position of the parties in this amicus brief. We urge the NLRB to correct the course of its interpretation of Section 2(11) to conform with the stated intent of Congress. The parties again express their appreciation to the Board for this opportunity to be heard.

Respectfully submitted,

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FACILITIES ASSOCIATION, INC.

Dated: September 18, 1003  
White Plains, New York

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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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**OAKWOOD HEALTHCARE,**

**Employer**

**- and -**

**CASE 7-RC-22141**

**INTERNATIONAL UNION, UNITED AUTOMOBILE,  
AEROSPACE AND AGRICULTURAL IMPLEMENT  
WORKERS OF AMERICA (UAW), AFL-CIO,**

**Petitioner.**

**BEVERLY ENTERPRISES-MINNESOTA, INC.,  
d/b/a GOLDEN CREST HEALTHCARE CENTER,**

**Employer**

**- and -**

**CASES 18-RC-16415 and  
18-RC-16416**

**UNITED STEELWORKERS OF AMERICA,  
AFL-CIO, CLC,**

**Petitioner.**

**CROFT METALS, INC.,**

**Employer**

**- and -**

**CASE 15-RC-8393**

**INTERNATIONAL BROTHERHOOD OF BOILER-  
MAKERS, IRON SHIP BUILDERS, BLACKSMITHS,  
FORGERS AND HELPERS, AFL-CIO**

**Petitioner.**

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**CERTIFICATE OF SERVICE**

In addition to filing by Federal Express twenty-four (24) copies of Amicus Curiae brief with Executive Secretary Lester A. Heltzer, in the above-captioned matter, we hereby certify that copies have been served this 18<sup>th</sup> day of September, 2003, by Federal Express, upon:

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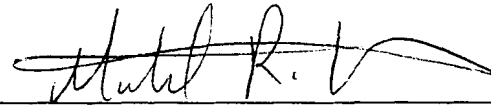
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